

XI. PROGRESS REPORTS

Defendants shall submit to Ecology written progress reports that describe the actions taken during the previous month to implement the requirements of this Decree. The progress reports shall include the following:

- A. A list of on-site activities that have taken place during the month;
- B. Detailed description of any deviations from required tasks not otherwise documented in project plans or amendment requests;
- C. Description of all deviations from the schedule (Exhibit C) during the current month and any planned deviations in the upcoming month;
- D. For any deviations in schedule, a plan for recovering lost time and maintaining compliance with the schedule;
- E. All raw data (including laboratory analysis) received by the Defendants during the past month and an identification of the source of the sample; and
- F. A list of deliverables for the upcoming month if different from the schedule.

All progress reports shall be submitted monthly from the effective date of this Decree until three (3) months after implementation of the cleanup action is completed. Thereafter, Defendants shall submit progress reports annually. All progress reports shall be submitted by the tenth (10) day of the month in which they are due after the effective date of this Decree. Progress reports shall be sent to Ecology's project coordinator by facsimile and first class U.S. mail. Unless otherwise specified, any other documents submitted pursuant to this Decree shall be sent by certified mail, return receipt requested, to Ecology's project coordinator.

XII. RETENTION OF RECORDS

Defendants shall preserve, during the pendency of this Decree and for ten (10) years from the date this Decree is no longer in effect as provided in Section XXV, all records, reports, documents, and underlying data in its possession relevant to the implementation of this

Decree and shall insert in contracts with project contractors and subcontractors a similar record retention requirement. Upon request of Ecology, Defendants shall make all non-archived records available to Ecology and allow access for review. All archived records shall be made available to Ecology within a reasonable period of time.

XIII. TRANSFER OF INTEREST IN PROPERTY

No voluntary or involuntary conveyance or relinquishment of title, easement, leasehold, or other interest held by a Defendant in any portion of the Site shall be consummated without provision for continued operation and maintenance of any containment system, treatment system, and monitoring system installed or implemented pursuant to this Decree.

Prior to transfer of any legal or equitable interest in all or any portion of the property, and during the effective period of this Decree, Defendants shall serve a copy of this Decree upon any prospective purchaser, lessee, transferee, assignee, or other successor in interest of the property; and, at least thirty (30) days prior to any transfer, Defendants shall notify Ecology of said contemplated transfer.

XIV. RESOLUTION OF DISPUTES

A. In the event a dispute arises as to an approval, disapproval, proposed modification or other decision or action by Ecology's project coordinator, the parties shall utilize the dispute resolution procedure set forth below.

(1) Upon receipt of the Ecology project coordinator's decision, the Defendants have fourteen (14) days within which to notify Ecology's project coordinator of their objection to the decision.

(2) The parties' project coordinators shall then confer in an effort to resolve the dispute. If the project coordinators cannot resolve the dispute within fourteen (14) days, Ecology's project coordinator shall issue a written decision.

1 (3) Defendants may then request Ecology management review of the
2 decision. This request shall be submitted in writing to the Toxics Cleanup Program Manager
3 within seven (7) days of receipt of Ecology's project coordinator's decision.

4 (4) Ecology's Program Manager shall conduct a review of the dispute and
5 shall issue a written decision regarding the dispute within thirty (30) days of the Defendants'
6 request for review. The Program Manager's decision shall be Ecology's final decision on the
7 disputed matter.

8 B. If Ecology's final written decision is unacceptable to Defendants, Defendants
9 have the right to submit the dispute to the Court for resolution. The parties agree that one
10 judge should retain jurisdiction over this case and shall, as necessary, resolve any dispute
11 arising under this Decree. In the event Defendants present an issue to the Court for review, the
12 Court shall review the action or decision of Ecology on the basis of whether such action or
13 decision was arbitrary and capricious and render a decision based on such standard of review.

14 C. The parties agree to only utilize the dispute resolution process in good faith and
15 agree to expedite, to the extent possible, the dispute resolution process whenever it is used.
16 Where either party utilizes the dispute resolution process in bad faith or for purposes of delay,
17 the other party may seek sanctions.

18 Implementation of these dispute resolution procedures shall not provide a basis for
19 delay of any activities required in this Decree, unless Ecology agrees in writing to a schedule
20 extension or the Court so orders.

21 **XV. AMENDMENT OF CONSENT DECREE**

22 This Decree may only be amended by a written stipulation among the parties to this
23 Decree that is entered by the Court or by order of the Court. Such amendment shall become
24 effective upon entry by the Court. Agreement to amend shall not be unreasonably withheld by
25 any party to the Decree.

1 Defendants shall submit any request for an amendment to Ecology for approval.
2 Ecology shall indicate its approval or disapproval in a timely manner after the request for
3 amendment is received. If the amendment to the Decree is substantial, Ecology will provide
4 public notice and opportunity for comment. Reasons for the disapproval shall be stated in
5 writing. If Ecology does not agree to any proposed amendment, the disagreement may be
6 addressed through the dispute resolution procedures described in Section XIV of this Decree.

7 **XVI. EXTENSION OF SCHEDULE**

8 A. An extension of schedule shall be granted only when a request for an extension
9 is submitted in a timely fashion, generally at least thirty (30) days prior to expiration of the
10 deadline for which the extension is requested, and good cause exists for granting the extension.
11 All extensions shall be requested in writing. The request shall specify the reason(s) the
12 extension is needed.

13 An extension shall only be granted for such period of time as Ecology determines is
14 reasonable under the circumstances. A requested extension shall not be effective until
15 approved by Ecology or the Court. Ecology shall act upon any written request for extension in
16 a timely fashion. It shall not be necessary to formally amend this Decree pursuant to Section
17 XV when a schedule extension is granted.

18 B. The burden shall be on the Defendants to demonstrate to the satisfaction of
19 Ecology that the request for such extension has been submitted in a timely fashion and that
20 good cause exists for granting the extension. Good cause includes, but is not limited to, the
21 following.

22 (1) Circumstances beyond the reasonable control and despite the due
23 diligence of Defendants including delays caused by unrelated third parties or Ecology, such as
24 (but not limited to) delays by Ecology in reviewing, approving, or modifying documents
25 submitted by Defendants; or

(2) Acts of God, including fire, flood, blizzard, extreme temperatures, storm, or other unavoidable casualty; or

(3) Endangerment as described in Section XVII.

However, neither increased costs of performance of the terms of the Decree nor changed economic circumstances shall be considered circumstances beyond the reasonable control of Defendants.

C. Ecology may extend the schedule for a period not to exceed ninety (90) days, except where an extension is needed as a result of:

(1) Delays in the issuance of a necessary permit which was applied for in a timely manner; or

(2) Other circumstances deemed exceptional or extraordinary by Ecology; or

(3) Endangerment as described in Section XVII.

Ecology shall give Defendants written notification in a timely fashion of any extensions granted pursuant to this Decree.

XVII. ENDANGERMENT

In the event Ecology determines that activities implementing or in noncompliance with this Decree, or any other circumstances or activities, are creating or have the potential to create a danger to the health or welfare of the people on the Site or in the surrounding area or to the environment, Ecology may order Defendants to stop further implementation of this Decree for such period of time as needed to abate the danger or may petition the Court for an order as appropriate. During any stoppage of work under this section, the obligations of Defendants with respect to the work under this Decree which is ordered to be stopped shall be suspended and the time periods for performance of that work, as well as the time period for any other work dependent upon the work which is stopped, shall be extended, pursuant to Section XVI of

1 this Decree, for such period of time as Ecology determines is reasonable under the
2 circumstances.

3 In the event Defendants determine that activities undertaken in furtherance of this
4 Decree or any other circumstances or activities are creating an endangerment to the people on
5 the Site or in the surrounding area or to the environment, Defendants may stop implementation
6 of this Decree for such period of time necessary for Ecology to evaluate the situation and
7 determine whether Defendants should proceed with implementation of the Decree or whether
8 the work stoppage should be continued until the danger is abated. Defendants shall notify
9 Ecology's project coordinator as soon as possible, but no later than twenty-four (24) hours after
10 such stoppage of work, and thereafter provide Ecology with documentation of the basis for the
11 work stoppage. If Ecology disagrees with the Defendants' determination, it may order
12 Defendants to resume implementation of this Decree. If Ecology concurs with the work
13 stoppage, the Defendants' obligations shall be suspended and the time period for performance
14 of that work, as well as the time period for any other work dependent upon the work which was
15 stopped, shall be extended, pursuant to Section XVI of this Decree, for such period of time as
16 Ecology determines is reasonable under the circumstances. Any disagreements pursuant to the
17 clause shall be resolved through the dispute resolution procedures in Section XIV.

18 **XVIII. OTHER ACTIONS**

19 Ecology reserves its rights to institute remedial action(s) at the Site and subsequently
20 pursue cost recovery, and Ecology reserves its rights to issue orders and/or penalties or take
21 any other enforcement action pursuant to available statutory authority under the following
22 circumstances:

23 1. Where Defendants fail, after notice, to comply with any requirement of this
24 Decree;

2. In the event or upon the discovery of a release or threatened release not addressed by this Decree;

3. Upon Ecology's determination that action beyond the terms of this Decree is necessary to abate an emergency situation which threatens public health or welfare or the environment; or

4. Upon the occurrence or discovery of a situation beyond the scope of this Decree as to which Ecology would be empowered to perform any remedial action or to issue an order and/or penalty, or to take any other enforcement action. This Decree is limited in scope to the geographic Site described in Exhibit A and to those contaminants that Ecology knows to be at the Site when this Decree is entered.

Ecology reserves all rights regarding the injury to, destruction of, or loss of natural resources resulting from the release or threatened release of hazardous substances from the South Wilbur Petroleum Contamination Site.

Ecology reserves the right to take any enforcement action whatsoever, including a cost recovery action, against potentially liable persons not party to this Decree.

XIX. INDEMNIFICATION

Defendants agree to indemnify and save and hold the State of Washington, its employees, and agents harmless from any and all claims or causes of action for death or injuries to persons or for loss or damage to property arising from or on account of acts or omissions of Defendants, their officers, employees, agents, or contractors in entering into and implementing this Decree. However, the Defendants shall not indemnify the State of Washington nor save nor hold its employees and agents harmless from any claims or causes of action arising out of the negligent acts or omissions of the State of Washington, or the employees or agents of the State, in implementing the activities pursuant to this Decree.

1 **XX. COMPLIANCE WITH APPLICABLE LAWS**

2 A. All actions carried out by Defendants pursuant to this Decree shall be done in
3 accordance with all applicable federal, state, and local requirements, including requirements to
4 obtain necessary permits, except as provided in paragraph B of this section.

5 B. Pursuant to RCW 70.105D.090(l), the substantive requirements of chapters
6 70.94, 70.95, 70.105, 75.20, 90.48, and 90.58 RCW, and of any laws requiring or authorizing
7 local government permits or approvals for the remedial action under this Decree that are
8 known to be applicable at the time of entry of the Decree have been included in Exhibit B, the
9 Cleanup Action Plan, and are binding and enforceable requirements of the Decree. Defendants
10 have a continuing obligation to determine whether additional permits or approvals addressed in
11 RCW 70.105D.090(l) would otherwise be required for the remedial action under this Decree.
12 In the event either Defendants or Ecology determine that additional permits or approvals
13 addressed in RCW 70.105D.090(l) would otherwise be required for the remedial action under
14 this Decree, it shall promptly notify the other party of this determination. Ecology shall
15 determine whether Ecology or Defendants shall be responsible to contact the appropriate state
16 and/or local agencies. If Ecology so requires, Defendants shall promptly consult with the
17 appropriate state and/or local agencies and provide Ecology with written documentation from
18 those agencies of the substantive requirements those agencies believe are applicable to the
19 remedial action. Ecology shall make the final determination on the additional substantive
20 requirements that must be met by Defendants and on how Defendants must meet those
21 requirements. Ecology shall inform Defendants in writing of these requirements. Once
22 established by Ecology, the additional requirements shall be enforceable requirements of this
23 Decree. Defendants shall not begin or continue the remedial action potentially subject to the
24 additional requirements until Ecology makes its final determination.
25

Ecology shall ensure that notice and opportunity for comment is provided to the public and appropriate agencies prior to establishing the substantive requirements under this section.

C. Pursuant to RCW 70.105D.090(2), in the event Ecology determines that the exemption from complying with the procedural requirements of the laws referenced in RCW 70.105D.090(1) would result in the loss of approval from a federal agency which is necessary for the State to administer any federal law, the exemption shall not apply and the Defendants shall comply with both the procedural and substantive requirements of the laws referenced in RCW 70.105D.090(1), including any requirements to obtain permits.

XXI. REMEDIAL AND INVESTIGATIVE COSTS

A. The Defendants agrees to pay costs incurred by Ecology pursuant to this Decree. These costs shall include work performed by Ecology or its contractors for, or on, the Site under Ch. 70.105D RCW both prior to and subsequent to the issuance of this Decree for investigations, remedial actions, and Decree preparation, negotiations, oversight and administration. Ecology costs shall include costs of direct activities and support costs of direct activities as defined in WAC 173-340-550(2). The Defendants agree to pay the required amount within ninety (90) days of receiving from Ecology an itemized statement of costs that includes a summary of costs incurred, an identification of involved staff, and the amount of time spent by involved staff members on the project. A general statement of work performed will be provided upon request. Itemized statements shall be prepared quarterly. Failure to pay Ecology's costs within ninety (90) days of receipt of the itemized statement will result in interest charges.

B. A prior Cost Recovery balance of \$42,806.66 exists. Repayment of this amount shall be made to Ecology at not less than five thousand (\$5,000) dollars per quarter. This balance shall not be subject to interest if this payment is made within ninety (90) days of

1 receipt of the quarterly itemized statement of current charges. If the minimum payment is not
2 made, then the quarterly repayment will be subject to interest charges.

3 **XXII. IMPLEMENTATION OF REMEDIAL ACTION**

4 If Ecology determines that Defendants have failed without good cause to implement the
5 remedial action, Ecology may, after notice to Defendants, perform any or all portions of the
6 remedial action that remain incomplete. If Ecology performs all or portions of the remedial
7 action because of the Defendants' failure to comply with its obligations under this Decree,
8 Defendants shall reimburse Ecology for the costs of doing such work in accordance with
9 Section XXI, provided that Defendants are not obligated under this section to reimburse
10 Ecology for costs incurred for work inconsistent with or beyond the scope of this Decree.

11 **XXIII. FIVE YEAR REVIEW**

12 As remedial action, including ground water monitoring, continues at the Site, the
13 parties agree to review the progress of remedial action at the Site, and to review the data
14 accumulated as a result of site monitoring as often as is necessary and appropriate under the
15 circumstances. At least every five years the parties shall meet to discuss the status of the Site
16 and the need, if any, of further remedial action at the Site. Ecology reserves the right to require
17 further remedial action at the Site under appropriate circumstances. This provision shall
18 remain in effect for the duration of the Decree.

19 **XXIV. PUBLIC PARTICIPATION**

20 Ecology shall maintain the responsibility for public participation at the Site. However,
21 Defendants shall cooperate with Ecology and, if agreed to by Ecology, shall:

22 A. Prepare drafts of public notices and fact sheets at important stages of the
23 remedial action, such as the submission of work plans, Remedial Investigation/Feasibility
24 Study reports and engineering design reports. Ecology will finalize (including editing if
25

1 necessary) and distribute such fact sheets and prepare and distribute public notices of Ecology's
2 presentations and meetings;

3 B. Notify Ecology's project coordinator prior to the preparation of all press releases
4 and fact sheets, and before major meetings with the interested public and local governments.
5 Likewise, Ecology shall notify Defendants prior to the issuance of all press releases and fact
6 sheets, and before major meetings with the interested public and local governments;

7 C. Participate in public presentations on the progress of the remedial action at the
8 Site. Participation may be through attendance at public meetings to assist in answering
9 questions, or as a presenter;

10 D. In cooperation with Ecology, arrange and/or continue information repositories
11 to be located at the Hesseltine Public Library at 14 NW Division St., Wilbur WA and
12 Ecology's Eastern Regional Office at 4601 N. Monroe, Spokane WA. At a minimum, copies
13 of all public notices, fact sheets, and press releases; all quality assured ground water, surface
14 water, soil sediment, and air monitoring data; remedial actions plans, supplemental remedial
15 planning documents, and all other similar documents relating to performance of the remedial
16 action required by this Decree shall be promptly placed in these repositories.

17 **XXV. DURATION OF DECREE**

18 This Decree shall remain in effect and the remedial program described in the Decree
19 shall be maintained and continued until the Defendants have received written notification from
20 Ecology that the requirements of this Decree have been satisfactorily completed.

21 **XXVI. CLAIMS AGAINST THE STATE**

22 Defendants hereby agree that they will not seek to recover any costs accrued in
23 implementing the remedial action required by this Decree from the Washington State
24 Department of Ecology; and further, that the Defendants will make no claim against the State
25

1 Toxics Control Account or any Local Toxics Control Account for any costs incurred in
2 implementing this Decree, with the exception of grants and funding from both state and local
3 toxics accounts. Except as provided above, however, Defendants expressly reserve their right
4 to seek to recover any costs incurred in implementing this Decree from any other potentially
5 liable person.

6 **XXVII. COVENANT NOT TO SUE / REOPENERS**

7 A. In consideration of the Defendants' compliance with the terms and conditions of
8 this Decree, Ecology agrees that compliance with this Decree shall stand in lieu of any and all
9 administrative, legal, and equitable remedies and enforcement actions available to the State
10 against the Defendants regarding all matters within the scope of this Decree.

11 B. Reopeners: In the following circumstances, Ecology may exercise its full
12 legal authority to address releases of hazardous substances at the Site, notwithstanding the
13 Covenant Not To Sue set forth above:

14 (1) In the event Defendants fail to comply with the terms and conditions of
15 this Decree, including all Exhibits, and after written notice of non-compliance, such failure is
16 not cured by Defendants within thirty (30) days of receipt of notice of non-compliance.

17 (2) In the event factors not known at the time of entry of this Decree and not
18 disclosed to Ecology are discovered and such factors present a previously unknown threat to
19 human health or the environment and are not addressed by the Cleanup Action Plan, attached
20 hereto as Exhibit B.

21 (3) Upon Ecology's determination that actions beyond the terms of this
22 Decree are necessary to abate an emergency or endangerment situation which threatens public
23 health, welfare, or the environment.

24 (4) In the event that the results of groundwater monitoring indicate that
25 cleanup standards are being exceeded.

1 C. Applicability: The Covenant Not To Sue set forth above shall have no
2 applicability whatsoever to:

- 3 (1) Criminal Liability;
- 4 (2) Actions against PLP's who are not parties to this Decree;
- 5 (3) Liability for damages for injury to, destruction of, or loss of natural
6 resources;
- 7 (4) Determinations pursuant to groundwater monitoring that show that
8 cleanup levels are being exceeded.

9 D. Ecology retains all of its legal and equitable rights against all persons except as
10 otherwise provided in this Decree.

11 **XXVIII. CONTRIBUTION PROTECTION**

12 With regard to claims for contribution against the Defendants, the parties intend that the
13 Defendants will obtain protection against claims for contribution for matters addressed in this
14 Decree pursuant to RCW 70.105D.040(4)(d).

15 **XXIX. LAND USE RESTRICTIONS**

16 Because residual concentrations of hazardous substances at the Site will exceed
17 residential cleanup levels following completion of the remedial action, Defendant agrees that a
18 Restrictive Covenant (Exhibit D) shall be recorded with the office of the Lincoln County
19 Auditor within ten (10) days of the completion of the remedial action. The Restrictive
20 Covenant shall restrict future uses of the Site. Defendant will provide Ecology with a copy of
21 the recorded Restrictive Covenant within thirty (30) days of the recording date.

22 **XXX. EFFECTIVE DATE**

23 This Decree is effective upon the date it is entered by the Court.
24
25

XXXI. PUBLIC NOTICE AND WITHDRAWAL OF CONSENT

This Decree has been the subject of public notice and comment under RCW 70.105D.040(4)(a). As a result of this process, Ecology has found that this Decree will lead to a more expeditious cleanup of hazardous substances at the Site.

If the Court withholds or withdraws its consent to this Decree, it shall be null and void at the option of any party and the accompanying Complaint shall be dismissed without costs and without prejudice. In such an event, no party shall be bound by the requirements of this Decree.

STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY

CHRISTINE O. GREGOIRE
Attorney General

JIM PENDOWSKI
Program Manager
Toxics Cleanup Program

ELLIOTT FURST, WSBA # 12026
Senior Counsel

Date: _____

Date: _____

LINCOLN COUNTY

ATTORNEY FOR LINCOLN COUNTY

CHAIRMAN
Title: Board of County Commissioners
Date: 9-20-04

Date: 09-17-04

DATED this _____ day of _____, 2003.

JUDGE
Lincoln County Superior Court